Supreme Court, U.S.
FILED

No. 08-481 OCT 6 - 2008

IN THE OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES

SWAMI INC.
*Petitioner*,

*v.*

ROBERT LEE in his capacity as Allen County Treasurer,
THERESE BROWN in her capacity as Allen County Auditor,
and THELMA RETZ
*Respondents.*

*ON PETITION FOR WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS*

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# APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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## APPENDIX A

IN THE INDIANA COURT OF APPEALS
CAUSE NO. 02A03-0706-CV-254

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SWAMI INC.,
Respondent-Appellee,
v.
ROBERT LEE[1], in his capacity as Allen County Treasurer, THERESE BROWN, in her capacity as Allen County Auditor and THELMA RETZ,
Plaintiffs-Appellants

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Appeal from the from the Allen County Indiana Circuit Court Cause No. 02C01-0208-PL-109
The Honorable Thomas J. Ryan, Senior Judge.

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DECIDED JANUARY 25, 2008

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MEMORANDUM DECISION - NOT FOR PUBLICATION-CRONE, Judge

**Case Summary**

Thelma Retz appeals the grant of the motion for relief from judgment filed by Swami, Inc., pursuant to Indiana Trial Rule 60(B)(6). We reverse.

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[1] Plaintiffs Lee and Brown did not participate in this appeal. Pursuant to Indiana Appellate Rule 17(A), however, a party of record in the trial court is a party on appeal.

**Issue**

The sole issue for our review is whether the trial court erred in granting Swami's motion for relief from judgment.[2]

**Facts and Procedural History**[3]

Swami is a for-profit Indiana corporation. In 1999, Swami purchased a parcel of real property in Allen County, located at 9100 Illinois Road in Fort Wayne ("the Property"). Swami paid no property taxes on the Property from May 11, 2000, through July 2002. In July 2002, the Allen County treasurer's office certified the Property for placement in the 2002 Allen County fall tax sale.

At all relevant times, Swami's principal place of business was the residence of its president, Subhash Reddy. Reddy changed residences four times during the three-and-a half-year period following Swami's purchase of the Property, but Swami never filed a notarized change of address affidavit or notarized letter seeking a change of

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[2] Swami claims that Retz's statement of the case is argumentative and requests that we strike it. We agree that portions of Retz's statement of the case belong in her argument section, and hereby grant Swami's motion to strike as to those portions. Indiana Appellate Rule 46(A)(6) specifies that the statement of the case "shall briefly describe the nature of the case, the course of the proceedings relevant to the issues presented for review, and the disposition of these issues by the trial court[.]"

[3] We hereby deny Swami's motion to strike Retz's statement of facts.

address. The Allen County auditor's office sent a notice of tax sale to Swami's address of record, but it was marked "Undeliverable as Addressed" and returned to the auditor's office. Appellant's App. at 535-36, 547. The auditor's office searched its records and a local phonebook, but found no other address for Swami. The auditor's office sent a second notice to Swami addressed to an adjoining property owned by Swami, but that was returned to the auditor's office marked "No Such Number." *Id.* at 537, 548. Additional notice of the tax sale was posted at a public place of posting and published in two local newspapers for three consecutive weeks prior to the tax sale.

Retz bought the Property at the 2002 tax sale. The price Retz paid for the Property exceeded the delinquent fees and taxes owed on the Property, and the surplus was claimed by Swami's agent, National Cash Refund, Inc.

During the one-year redemption period, the auditor's office sent notice to Swami that the tax sale had taken place. The notice was returned as undeliverable. *Id.* at 540, 562. A title search on the Property revealed Mid Am Bank, the mortgagee of record, as the only person with a substantial property interest of public record. The auditor's office also sent notice of the tax sale to Mid Am Bank, which was accepted.

After the redemption period expired, another notice was sent to Swami and returned. *Id.* at 542, 567. An identical notice sent to Mid Am Bank was accepted. On October 8, 2003, the auditor's office

filed a petition with the trial court, requesting authority to issue a tax deed to Retz for the Property. On November 14, 2003, the trial court ordered the issuance of the tax deed to Retz. *Id.* at 118. On November 24, 2003, the auditor's office transferred and conveyed to Retz a tax deed for the Property[4].

On January 12, 2004, Swami filed its verified objection to the issuance of tax deed, in which it stated that it had never received notice of the tax sale and had no actual knowledge of the tax sale or actions related to it.4 *Id.* at 123-24. On January 30, 2004, Retz moved to intervene. On March 31, 2005, Retz filed a motion for summary judgment, arguing that

> [(1)] the Auditor's Office properly performed all essential acts concerning the tax sale and substantially complied with the statutory procedures, thus satisfying due process requirements [; (2)]

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[4] Pursuant to Indiana Code Section 6-1.1-25-4.6(h), "[a] tax deed issued under this section is incontestable except by appeal from the order of the court directing the county auditor to issue the tax deed filed not later than sixty (60) days after the date of the court's order." The issuance of a tax deed can be appealed under this statute by either an independent action or a Trial Rule 60(B) motion in the same trial court that issued the original tax deed. *B. P. Amoco Corp. v. Szymanski*, 808 N.E.2d 683, 690 (Ind. Ct. App. 2004), *trans. denied*. Swami initially brought an independent action.

> Swami failed to rebut the prima facie evidence regarding the regularity and validity of the tax sale proceedings [; (3)] notice to Swami at its last known address was adequate and Swami's failure to inform the Auditor's Office of its current address precludes its lack of notice defense [; (4)] Swami waived its right to the [Property] by claiming the entire Surplus fund from the County.

*Id.* at 63, 66, 68, 71. Swami filed a cross motion for summary judgment, arguing that it satisfied the statutory requirements necessary to defeat the tax deed, that it was entitled to a cancellation of the tax deed based on theories of equity, and that the Property was taken from it without just compensation in violation of federal and state constitutional guarantees. *Id.* at 154-68. The trial court granted Retz's motion for summary judgment and denied Swami's cross motion for summary judgment.

Swami appealed, raising the following issues:

> 1. Whether the trial court erred when it applied the plain meaning of the words and phrases in Indiana Code Section 6-1.1-25-16[5] and refused to set aside a tax sale.

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[5] Indiana Code Section 6-1.1-25-16 provides:

2. Whether Swami is entitled to relief under Indiana Trial Rule 60(B) based on an alleged misrepresentation by an employee in the Allen County Treasurer's Office regarding the amount of real property taxes due.
3. Whether [the limitation of remedies in] Indiana Code Section 6-1.1-25-16 violates a taxpayer's [substantive] due process rights under the United States

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A person may, upon appeal, defeat the title conveyed by a tax deed executed under this chapter only if:
(1) the tract or real property described in the deed was not subject to the taxes for which it was sold;
(2) the delinquent taxes or special assessments for which the tract or real property was sold were paid before the sale;
(3) the tract or real property was not assessed for the taxes and special assessments for which it was sold;
(4) the tract or real property was redeemed before the expiration of the period of redemption (as specified in section 4 of this chapter);
(5) the proper county officers issued a certificate, within the time limited by law for paying taxes or for redeeming the tract or real property, which states either that no taxes were due at the time the sale was made or that the tract or real property was not subject to taxation;
(6) the description of the tract or real property was so imperfect as to fail to describe it with reasonable certainty; or
(7) the notices required by IC 6-1.1-24-2, IC 6-1.1-24-4, and sections 4.5 and 4.6 of this chapter were not in substantial compliance with the manner prescribed in those sections.

> Constitution and the Indiana Constitution.

*Swami, Inc. v. Lee*, 841 N.E.2d 1173, 1174 (Ind. Ct. App. 2006), *trans. denied*. In affirming the trial court, we held that (1) Swami failed to inform the auditor's office of its change of address and therefore was not entitled to equitable relief; (2) Swami did not file a Trial Rule 60(B) motion with the trial court and therefore could not challenge the tax deed on that basis at the appellate level; and (3) the limitation of remedies provided by Indiana Code Section 6-1.1-25-16 did not violate substantive due process rights. *Id.* at 1180-81. We noted that Swami did not contend that the auditor failed to comply with notice requirements. *Id.* at 1180.

On March 8, 2006, Swami petitioned for transfer to the Indiana Supreme Court presenting the following question:

> Whether this case presents an important question of law and a question of great public importance that has not been, but should be, decided by the Supreme Court where the Court of Appeals concluded that equity should not intervene to set aside a tax sale deed where a landowner's representative was given inaccurate information about property taxes owed and a pending tax sale by a

> county official responsible for collection of property taxes.

Appellant's App. at 306. On April 26, 2006, the United States Supreme Court decided *Jones v. Flowers*, 547 U.S. 220 (2006), in which the court held that when notice of a tax sale is mailed to the owner and returned undelivered, the Due Process Clause of the Fourteenth Amendment requires the government to take additional reasonable steps to provide notice before taking the owner's property. 547 U.S. at 234. On May 16, 2006, while transfer was still pending, Swami filed a verified motion to remand so that the trial court could examine whether Indiana's statutory notice requirements satisfied federal due process rights in light of the *Flowers* decision. *See* Ind. Appellate Rule 37 ("At any time after the Court on Appeal obtains jurisdiction, any party may file a motion requesting that the appeal be dismissed without prejudice or temporarily stayed and the case remanded to the trial court or Administrative Agency for further proceedings."). On July 6, 2006, the Indiana Supreme Court denied transfer without ruling on Swami's motion to remand.

On August 25, 2006, Swami filed the motion for relief from judgment pursuant to Trial Rule 60(B)(6) that is the subject of this appeal. In the motion, Swami alleged that the "Allen County Auditor's efforts to provide notice to Swami of the tax sale and petition for tax deed were insufficient to satisfy due process given the circumstances of

this case. Consequently, the tax sale and tax sale deed are void." Appellant's App. at 448. The trial court granted Swami's motion. Retz appeals.

**Discussion and Decision**

Swami filed a motion for relief from judgment pursuant to Indiana Trial Rule 60(B)(6), which provides in relevant part, "On motion and upon such terms as are just the court may relieve a party or his legal representative from an entry of default, final order, or final judgment, including a judgment by default for the following reasons: ... (6) the judgment is void[.]" Normally, we apply an abuse of discretion standard in reviewing a trial court's ruling on a motion for relief from judgment. *Hotmix & Bituminous Equip. Inc. v. Hardrock Equip. Corp.*, 719 N.E.2d 824, 826 (Ind. Ct. App. 1999). "However, the standard of review for the granting of a motion for relief from judgment made pursuant to Trial Rule 60(B)(6), alleging that the judgment is void, requires no discretion on the part of the trial court because either the judgment is void or it is valid."[6] *Id.* A Trial Rule 60(B) motion for relief from judgment may not be used as a substitute for a direct appeal. *Goldsmith v. Jones*, 761 N.E.2d 471, 474 (Ind. Ct.

[6] Swami incorrectly asserts that two distinct standards of review apply to our review of the trial court's decision to grant its motion for relief from judgment

App. 2002). It affords relief only in extraordinary circumstances that are not the result of any fault or negligence on the part of the movant. *Id.*

Swami asserts that the Allen County auditor failed to provide constitutionally adequate notice to Swami of the tax sale and the issuance of the tax deed,[7] and therefore the trial court's order issuing

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[7] We have discussed constitutional due process requirements as to notice:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected ...." The constitutional requirements are satisfied if these conditions are reasonably met with "due regard for the practicalities and peculiarities of the case."

*Diversified Inv., LLC v. U.S. Bank, NA*, 838 N.E.2d 536, 539-40 (Ind. Ct. App. 2005) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950)), *trans. denied* (2006).

the tax deed to Retz was void ab initio.[8] In support, Swami cites *White v. White*, 796 N.E.2d 377 (Ind. Ct. App. 2003). There, P.S. was born to unmarried parents, and P.S.'s great-grandmother was appointed as legal guardian of P.S. In a *separate* paternity and support proceeding, the trial court ordered P.S.'s father to make child support payments to P.S.'s guardian. Later, mother and father filed a petition in the guardianship action to terminate guardianship proceedings. P.S.'s guardian did not receive notice of the petition. The trial court terminated the guardianship without a hearing the day the motion was filed. Also that same day, mother and father filed a stipulation and agreement in the paternity and support action asking the trial court to terminate the support order requiring father to pay P.S.'s guardian. The trial

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[8] There is a distinction between the terms "void" and "voidable."

> That which is "void" has no legal effect at any time and cannot be confirmed or ratified by subsequent action or inaction. That which is "voidable" has legal effect until such time as challenged in the appropriate manner and can be ratified or confirmed by subsequent action or inaction. A judgment (or appealable order) that is voidable may only be attacked through a direct appeal, whereas a void judgment is subject to collateral attack.

*Chapin v. Hulse*, 599 N.E.2d 217, 220 (Ind. Ct. App. 1992)

court entered an order giving custody of P.S. to father and vacating the support order immediately.

P.S.'s guardian timely filed a motion to correct error in the guardianship action, asking the trial court to vacate the order terminating her guardianship of P.S., which the trial court granted. A deputy prosecutor filed an information in the paternity and support action alleging that father had failed to pay child support. The trial court ruled that father was not behind in child support because no child support order had been in existence since the trial court vacated the support order. P.S.'s guardian filed a motion to correct error, which was denied, and she appealed. We held that because the guardian was not notified of the petition to change custody and terminate support, the order terminating father's responsibility to pay child support was void. *Id.* at 383.

*White* is inapplicable to this case. Unlike the motion to correct error filed in the child support action by P.S.'s guardian, Swami's motion for relief from judgment was not the first opportunity Swami had to challenge the issuance of the tax deed.[9]

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[9] Swami's reliance on *Stidham v. Whelchel*, 698 N.E.2d 1152 (Ind. 1998), is also misplaced. There, our supreme court stated that "a default judgment that is rendered

Inasmuch as Swami has already availed itself of the opportunity to challenge the issuance of the tax deed, Retz argues that principles of res judicata and waiver prohibit Swami from raising its due process argument through a Trial Rule 60(B) motion.[10] Assuming, *without deciding*, that

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without minimum contacts violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and is void." *Id.* at 1154. *Stidham* involved a default judgment and lack of personal jurisdiction, neither of which is present here. *See, e.g., Tax Certificate Invs., Inc. v. Smethers*, 714 N.E.2d 131, 133 n.2 (Ind. 1999) (observing that adequacy of notice is a different question from trial court's exercise of personal or subject matter jurisdiction). Also, Stidham never had his day in court to challenge the judgment entered against him until he brought the motion for relief of judgment that was the subject of the appeal.

[10] Swami attempts to frame Retz's argument in terms of the law of the case doctrine. Appellee's Br. at 17. The law of the case doctrine is a discretionary tool by which appellate courts decline to revisit legal issues already determined on appeal in the same case and on substantially similar facts. *Rosby Corp. v. Townsend, Yosha, Cline & Price*, 800 N.E.2d 661, 664 (Ind. Ct. App. 2003), *trans. denied* (2004). To invoke the law of the case doctrine, the matters decided in the prior appeal clearly must appear to be the only possible construction of an opinion, and questions not conclusively decided in the prior appeal do not become the law of the case. *Id.* Here, Swami did not argue in a prior appeal that the notice provided by the auditor violated its due process rights. Therefore, the law of the case doctrine is inapplicable. *See, e.g., Learman v. Auto Owners Ins. Co.*, 769 N.E.2d 1171, 1175 (Ind. Ct. App. 2002) ("In the prior

the auditor's notice of the tax sale and issuance of the tax deed did not comply with federal due process requirements, we agree with Retz that the principle of res judicata bars Swami from claiming that the order issuing the tax deed is void.

> Res judicata serves to prevent repetitious litigation of disputes that are essentially the same. The doctrine of res judicata is divided into two distinct branches, claim preclusion and issue preclusion. Claim preclusion is applicable when a final judgment on the merits has been rendered and acts to bar a subsequent action on the same claim between the same parties. When claim preclusion applies, all matters that were or *might have been litigated are deemed conclusively decided by the judgment in the prior action.* Claim preclusion applies when the following four factors are present: (1) the former judgment was

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appeal, we determined whether the trial court erred by granting summary judgment to Auto-Owners based upon express and implied permission principles. We must now determine whether the trial court erred by granting judgment to Auto-Owners based upon actual or apparent agency principles. Because the actual or apparent agency theory was not argued in the prior appeal, the law of the case doctrine is inapplicable.")

> rendered by a court of competent jurisdiction; (2) the former judgment was rendered on the merits; (3) the matter now at issue was, *or could have been*, determined in the prior action; and (4) the controversy adjudicated in the former action was between parties to the present suit or their privies.

*Dawson v. Estate of Ott*, 796 N.E.2d 1190, 1195 (Ind. Ct. App. 2003) (emphases added) (citations omitted). "'Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case.' To hold otherwise would constitute an 'unprecedented departure from accepted principles of res judicata.'" *Perry v. Gulf Stream Coach, Inc.*, 871 N.E.2d 1038, 1048 (Ind. Ct. App. 2007) (quoting *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398-99 (1981)) (citations omitted).

Here, only one element of claim preclusion is contested: whether the matter now in issue could have been determined in the prior action. Swami argues that its inadequate notice claim was not available until *Flowers* was decided, which occurred after Swami had filed its petition for transfer. Swami asserts, "Prior to the *Flowers* decision, the law in Indiana was well-settled with

respect to the Constitutional notice requirements in tax sale cases□substantial compliance with Indiana's tax sale notice requirements was considered sufficient." Appellee's Br. at 18 (citing *Diversified Inv., LLC v. U.S. Bank, N.A.*, 838 N.E.2d 536, 542 (Ind. Ct. App. 2005)).[11] We disagree.

In *Diversified*, the plaintiff made the same argument that Swami claims was unavailable to it, that is, that Indiana's statutory notice procedures were constitutionally insufficient for the circumstances. *See Diversified*, 838 N.E.2d at 542-43. Contrary to Swami's assertion that it would have been sanctioned for making this argument, the plaintiff in *Diversified* was not sanctioned. Although under the particular facts of that case this Court held that the notice provided by the auditor's office was constitutionally adequate, it

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[11] Swami also cites *Clark v. Jones*, 519 N.E.2d 158 (Ind. Ct. App. 1988), in which we stated, "Even if the auditor knew that mail was being returned from that address, the notice statute and constitutional due process requirements do not impose upon the auditor a duty to search for an alternative address." *Id.* at 159. We disagree that *Clark* illustrates that Indiana law was radically different from the decision in *Flowers*. The *Flowers* court declined to prescribe the form of service that the government should adopt and emphasized that while "[appellant] believes that the Commissioner should have searched for his new address in the Little Rock phonebook and other government records such as income tax rolls[, w]e do not believe the government was required to go this far." 547 U.S. at 236-37

does not follow that the same result would have been reached in Swami's case had Swami brought such a challenge. *See McBain v. Hamilton County*, 744 N.E.2d 984 (Ind. Ct. App. 2001) (holding that upon return of notice to the auditor with a more recent mailing address, due process requires auditor to send notice to the property owner at alternate address). In fact, the *Diversified* court noted that "when notices mailed by a county auditor are returned in their entirety as undeliverable, with an alternative address indicated on the envelope, or where notices are returned as undeliverable due to an address discrepancy of which the auditor is deemed aware, it is incumbent upon the auditor to take further action to effectuate notice reasonably calculated to apprise an interested party of tax sale proceedings." 838 N.E.2d at 543.

We conclude that Swami's claim that the notice provided by the auditor was in violation of his due process rights was available and could have been litigated during its earlier challenge.[12]

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[12] We also disagree with Swami that *Flowers* drastically changed Indiana law. The *Flowers* court noted that its decision was in accord with its previous decisions, in that these decisions all "deemed notice constitutionally sufficient if it was reasonably calculated to reach the intended recipient when sent." 547 U.S. at 226. The *Flowers* court then observed that "[t]he Courts of Appeals and State Supreme Courts have addressed this question on

Accordingly, Swami is precluded by the doctrine of res judicata from claiming that the tax deed is void due to inadequate notice.[13] *See Shepherd v. Truex*, 823 N.E.2d 320, 326 (Ind. Ct. App. 2005) (holding that appellant's independent action for fraud on the court pursuant to Ind. Trial Rule 60(B), which in many circumstances is a collateral attack on a judgment, is subject to the doctrine of res judicata). In sum, the trial court erred in

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frequent occasions, and most have decided that when the government learns its attempt at notice has failed, due process requires the government to do something more before real property may be sold in a tax sale." *Id.* at 227. Indeed, the *Flowers* court stated, "In particular, we disclaim any new rule that is contrary to [*Dusenbery v. United States*, 534 U.S. 161 (2002)] and a significant departure from [*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)]. *Id.* at 238.

[13] We further note that because Swami had not argued to the trial court that the auditor's notice violated federal due process in its first challenge, this Court would have found the issue waived on direct appeal had Swami attempted to raise it there. *See, e.g., Troxel v. Troxel*, 737 N.E.2d 745, 752 (Ind. 2000) (appellant who failed to argue violation of due process to trial court waived issue for appellate review); *Hite v. Vanderburgh County Office of Family & Children*, 845 N.E.2d 175, 180 (Ind. Ct. App. 2006) (father never objected to termination because he lacked notice of CHINS proceeding and therefore due process argument was waived on appeal); *McBride v. Monroe County Office of Family & Children*, 798 N.E.2d 185, 194 (Ind. Ct. App. 2003) (failure to raise constitutional due process challenge waives issue for appellate review)

granting Swami's motion for relief from judgment, and therefore we reverse.

Reversed.

DARDEN, J., and MAY, J., concur.

## APPENDIX B

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|---|---|---|
| STATE OF INDIANA ) | | |
| | ) SS: | IN THE ALLEN |
| COUNTY OF ALLEN ) | | CIRCUIT COURT |
| ROBERT LEE, Allen | ) | |
| County Treasurer, and | ) | |
| LISBETH A. BLOSSER, | ) | |
| Allen County Auditor, | ) | |
| Plaintiffs, | ) | |
| | ) | |
| vs. | ) | Cause No.02C01- |
| | ) | 0208-PL-109 |
| 3607 COMPANY, P.L.L, | ) | |
| and All Other SImilarly | ) | |
| Situated Delinquent, | ) | |
| Taxpayers of Real Property | ) | |
| Taxes, | ) | |
| Defendants. | ) | |

ORDER OR JUDGMENT OF THE COURT

The Trial Rule 60(B) Petition of Swami, Inc. is granted in part subject to findings of fact and conclusions of law filed by separate order.

The parties are requested to contact the Court and arrange an evidentiary hearing pursuant to the authority of *Jones v. Flowers* as argued and cited in the Trial Rule 60(B) Petition of Swami, Inc.

Further, a case management conference may be scheduled by contacting Stephanie Kohrman, Judicial Assistant, Second Floor, Courthouse Annex at (260) 449-4004.

DATED: December 7, 2006

/s/
Thomas L. Ryan, Senior Judge
Allen Circuit Court

cc: Thomas A. Hardin, 2801 Beaver Avenue, Fort Wayne, IN 46807
Matthew J. Elliott/Andrea Dick, Courthouse Mail #87
Andrew S. Williams, Courthouse Mail #30

## APPENDIX C

| | | |
|---|---|---|
| STATE OF INDIANA | ) | |
| | ) | SS: IN THE ALLEN |
| COUNTY OF ALLEN | ) | CIRCUIT COURT |
| | | |
| ROBERT LEE, Allen | ) | |
| County Treasurer, and | ) | |
| LISBETH A. BLOSSER, | ) | |
| Allen County Auditor, | ) | |
| Plaintiffs, | ) | |
| | ) | |
| vs. | ) | Cause No.02C01- |
| | ) | 0208-PL-109 |
| 3607 COMPANY, P.L.L, | ) | |
| and All Other SImilarly | ) | |
| Situated Delinquent, | ) | |
| Taxpayers of Real Property | ) | |
| Taxes, | ) | |
| Defendants. | ) | |

**JUDGMENT UPON SWAMI, INC.'S TRIAL RULE 60(B) MOTION**

Swami, Inc. (Swami) returns to argue that *Jones v. Flowers* (2006), 126 S.Ct. 1708, 1718 decided April 26, 2006 after the decision of the Court of Appeals of Indiana on appeal of this case dated February 8, 2006 excepts Swami from the waiver arguments of Retz, *et al.* and the law of the case, so far as it goes, as established by opinion of the Court of Appeals.

"... The (county) should have taken additional reasonable steps to notify (Swami, Inc.) if practicable to do so." *Jones, supra.*

Swami cannot be held to anticipate and to waive a constitutional issue not yet decided nor known to it.

The Trial Court, as did the Court of Appeals, decided the original issue as a matter of law on "... strictly applied..." terms of Indiana Code 6-1.1-25-16. See, Slip Op. at p. 8.

Because the trial court postured and the Court of Appeals decided § 16 both strictly and literally, neither court considered the fact sensitive issue of the **application** of § 16, paragraph seven (7) and the reasonableness of the county's effort to ensure the integrity of the tax sale **after** the county has actual knowledge that the notice process had failed.

As the *Jones* court reasoned, it mattered not what Swami did or failed to do in respect to its interests, the county's constitutional obligations remained. *Supra,* at p. 1717. The trial Court's summary judgment and the Court of Appeal's affirmance thereof foreclosed judicial inquiry into the application § 16(7) and the reasonableness of the county's steps following its knowledge that the notice process had failed. At these stages of the tax sale process, Swami can not be charged

prospectively with the reasoning and decision of the United States Supreme Court in *Jones*.

Summary judgment as applied in this case is the antithesis of fair notice and opportunity to be heard. Remediation is not all of § 16. Sub-section (7) implicitly includes both the fundamental and the substantive rights of notice.

As the *Jones* court noted and thereby implied, although it is not responsible for drafting an acceptable notice process, the court knows (as did the government) when as applied process fails and further reasonable steps must be taken in order to meet constitutional standard. "...(G)iven the circumstances of this case... (the court is)... confident that additional reasonable steps were available for (the county) to employ before taking (Swami's) property.

This Court was deficient for summarily deciding that proof of those steps was immaterial and that genuine issues were absent.

This court misapprehended the constitutional duty of the county since it concluded as a matter of law that substantial compliance "*ex ante*" with "...the notices required by... sections 4.5 and 4.6 of this chapter..." satisfied both the county's constitutional duty and the court's duty of judicial review to the exclusion of considering"...what the government does with that information in assessing

the adequacy of the chosen procedure." *Supra*, at p. 1717.

This court concludes, as did *Jones*, that "... at the end of the day, that someone who actually wanted to alert (Swami)... would do more when the attempted notice letter was returned unclaimed, and there was more that reasonably could be done." *Supra*, at p. 1721.

This burden resets with and remains on the county to prove and with the court to consider "... what the government does with that information (of failed notice) in assessing the adequacy of the chosen procedure." *Supra*, at p. 1717.

DATED: December 13, 2006

/s/
Thomas L. Ryan, Senior Judge
Allen Circuit Court

cc: Andrew Williams, P.O. Box 11489, 803 S. Calhoun Street, 9th floor, Fort Wayne IN 46858
Thomas A. Hardin, Esq., 2810 Beaver Ave., Fort Wayne IN 46807
Patrick Hess, Esq., Matthew Elliott, Esq., Andrea Dick., Esq., 200 E. Main Street, Suite 800, Fort Wayne IN 46802

**APPENDIX D**

STATE OF INDIANA )
) SS: IN THE ALLEN
COUNTY OF ALLEN ) CIRCUIT COURT

| | | |
|---|---|---|
| ROBERT LEE, Allen County Treasurer, and LISBETH A. BLOSSER, Allen County Auditor, Plaintiffs, | ) | |
| vs. | ) | Cause No.02C01-0208-PL-109 |
| 3607 COMPANY, P.L.L, and All Other SImilarly Situated Delinquent, Taxpayers of Real Property Taxes, Defendants. | ) | |

CHRONOLOGICAL CASE SUMMARY
OF MAY 15, 2007

PARCEL 1974: ORDER ENTERED. UPON REMAND, THE PARTIES HAVE FILED JOINT STIPULATIONS, WHICH, TOGETHER WITH INFERENCES, ARE ADOPTED AS FINDINGS OF THE COURT. THE COURT CONCLUDES THAT THE EVIDENCE AND INFERENCES THEREFROM FAIL TO PREPONDERATE THAT

THE COUNTY TOOK ADDITIONAL PRACTICABLE AND REASONABLE STEPS TO PROVIDE ADEQUATE NOTICE TO SWAMI, ITS PRINCIPALS, AGENTS AND PERSONS IN PRIVITY TO SWAMI HAVING A SUBSTANTIAL PROPERTY INTEREST OF PUBLIC RECORD AFTER THE FIRST NOTICE OF TAX SALE SENT JULY 23, 2002 FAILED AND WAS RETURNED UNCLAIMED.

SWAMI IS ENTITLED TO T.R. 60(B) RELIEF FROM THIS COURT'S JUDGMENT. JONES V. FLOWERS CONTROLS. INDIANA'S NOTICE STATUTES ARE NOT CONCLUSIVE. THE JUDICIAL REVIEW PROCESS OF A TAX SALE IS A SAFETY NET AND EXISTS TO CURE UNFAIR CIRCUMSTANCES SUCH AS INSUFFICIENT PROCESS WHICH IS OTHERWISE DUE A CITIZEN.

THE COUNTY'S REPETITION OF THE NOTICE PROCESS OF THE TAX SALE SERVED TO FACILITATE A PREVIOUSLY FAILED STEP AND BECAME PRO FORMA.

NEITHER THE TAX SALE PURCHASER'S INTEREST IN A WINDFALL FOR THE STATE'S INTEREST (IN PROPERTY TAX REVENUE) COUNTER BALANCES SWAMI'S PROPERTY INTEREST. ALL INTERESTS, SAVE A WINDFALL, PRO FORMA ACCOMODATION OR A FORFEITURE, ARE

PROTECTED IN A PROCESS WHICH ASSUMES THE CONSTITUTIONAL APPLICATION OF A NOTICE PROCESS WHICH INCLUDES LASE RESORT TO THE COURT. THE FIRST JUDGMENT OF THIS COURT IS NOT SUPPORTED WITH EVIDENCE THAT THE COUNTY'S STEPS TO NOTIFY SWAMI WERE REASOBABLE.

THE BURDEN OF GOING FORWARD WITH EVIDENCE AND PROVING THE PROBABLE REASONABLENESS OF NOTICE TO SWAMI IS UPON THE COUNTY. IN THIS, THE COUNTY HAS FAILED.

THE TAX DEED IS SET ASIDE.

THIS ORDER IS FINAL AND APPEALABLE. COURT ISSUED NOTICE TO THE PARTIES. SLK

## APPENDIX E

IN THE COURT OF APPEALS OF INDIANA

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| THELMA RETZ, Appellant-Intervenor, | ) |
| and | ) |
| ROBERT LEE, Allen County Treasurer, and THERESE BROWN, Allen County Auditor, Plaintiffs, | ) |
| vs. | )No.02A03-<br>)0706-CV-254 |
| SWAMI, INC., Appellee-Defendant. | ) |

APPEAL FROM THE ALLEN CIRCUIT COURT
The Honorable Thomas J. Ryan, Senior Judge
Cause No. 02C01-0208-PL-109
April 1, 2008 MEMORANDUM DECISION ON REHEARING - NOT FOR PUBLICATION
CRONE, Judge

Swami, Inc., petitions for rehearing in *Retz v. Swami, Inc.*, No. 02A03-0706-CV-254 (Ind. Ct.

App. Jan. 25, 2007), in which we reversed the trial court's grant of Swami's motion for relief from judgment. We grant Swami's petition for the sole purpose of clarifying the basis for our decision but affirm our decision in all respects.

In our memorandum decision, we determined that Swami's claim that the auditor failed to provide constitutionally adequate notice to Swami of a tax sale and issuance of the tax deed was available at the time of the underlying litigation, and therefore Swami was barred by the doctrine of res judicata from presenting this argument in its motion for relief from judgment. *Id.*, slip op. at 9-13.

To illustrate that Swami would not have been subject to sanctions for pursuing a claim challenging the constitutionality of the notice provided, we cited *Diversified Investments, LLC v. U.S. Bank, N.A.*, 838 N.E.2d 536 (Ind. Ct. App. 2005). There, U.S. Bank "challenge[d] the statutory notice procedures of Indiana Code sections 6-1.1-25-4.5 and –4.6[14] [fn. 1

[14] [fn. 1 in original] The tax sale process is governed by Indiana Code Sections 6-1.1-24-1 through -14 and 6-1.1-25-1 through -19. Indiana Code Section 6-1.1-24-4 requires, *inter alia*, the county auditor to send notice of the county's application to obtain judgment and order for sale of real property to the last address of the property owner as indicated in the auditor's records. Indiana Code Section 6-1.1-25-4.5 requires, *inter alia*, that notice of the tax sale be sent to the record owner's last address. Indiana Code Section 6-1.1-25-4.6 requires, *inter alia*, that notice of the

in original] as constitutionally insufficient for the circumstances." *Id.* at 542-43. In reviewing this issue, the *Diversified* court noted,

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is *notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action* and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950). "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected ...." *Id.* at 315, 70 S. Ct. 652. The constitutional requirements are satisfied if these conditions are reasonably met with "*due regard for*

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purchaser's petition for issuance of tax deed be sent to the record owner's last address.

> *the practicalities and peculiarities of the case*." *Id.* at 314-15, 70 S. Ct. 652.

*Id.* at 539-540 (emphases added).

The *Diversified* court found that the notice provided by the auditor satisfied constitutional due process requirements because the auditor could reasonably infer that the notices were properly delivered where the notices were not returned to the auditor as undeliverable and the return receipt postcards were returned with signatures. *Id.* at 543-44. Thus, the *Diversified* court concluded that "with regard for the 'practicalities and peculiarities' of the present facts, we cannot say the auditor failed to meet constitutional due process requirements by giving notice in a fashion not reasonably calculated to apprise U.S. Bank's predecessor-in-interest of the pending tax sale proceedings." *Id.* at 544 (quoting *Mullane*, 339 U.S. at 314).

Here, the circumstances are different from those in *Diversified*, so the fact that notice was found to satisfy constitutional due process in *Diversified* does not necessarily dictate the same result in this case[15][fn. 2 in original]. More importantly,

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[15] [fn. 2 in original] Likewise, we acknowledge that the circumstances here are different from those in *McBain v. Hamilton County*, 744 N.E.2d 984 (Ind. Ct. App. 2001). In citing that case, we did not mean to suggest that Swami could have made the exact same argument as the McBains. Instead, we cited it as an example in which the assessment

*Diversified* demonstrates that a claim challenging whether substantial compliance with Indiana's tax sale notice requirements satisfied due process was available because tax sale procedural due process claims are reviewed on a case-by-case basis. Thus, Swami had the opportunity to argue that the auditor's notice was not "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314.

Any modification in the law resulting from the decision in *Jones v. Flowers*, 547 U.S. 220 (2006), cannot alter the fact that Swami had the opportunity to present constitutional claims regarding the auditor's provision of notice in the underlying litigation. *See Bd. of Comm'rs of Adams County v. State ex rel. Gibson*, 226 Ind. 633, 638, 82 N.E.2d 891, 892 (1948) ("The fact that the statute upon which the trial court based its first finding and judgment was afterward declared unconstitutional in a different action between other and different parties could in no way affect the force or conclusiveness of the judgment in that first case."). Simply put, Swami had an opportunity to present a claim that the auditor's notice failed to comply with constitutional due process in the underlying litigation and chose

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of the "practicalities and peculiarities" of the case led the court to conclude that the notice provided was constitutionally inadequate.

not to pursue that line of argument; Swami may not take a second bite at the apple. We affirm our original decision in all respects.

DARDEN, J., and MAY, J., concur.

**APPENDIX F**

IN THE INDIANA SUPREME COURT
CAUSE NO. 02S_____
COURT OF APPEALS CAUSE NO.
02A03-0706-CV-254

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|---|---|
| THELMA RETZ, Appellant-Intervenor, | ) |
| and | ) |
| ROBERT LEE, Allen County Treasurer, and THERESE BROWN, Allen County Auditor, Plaintiffs, | ) |
| vs. | )No.02A03-<br>)0706-CV-254 |
| SWAMI, INC., Appellee-Defendant. | ) |

APPEAL FROM THE ALLEN
CIRCUIT COURT
The Honorable Thomas J. Ryan, Senior Judge
Cause No. 02C01-0208-PL-109

INDIANA SUPREME COURT ORDER DENYING
TRANSFER JULY 10, 2008

THIS MATTER HAS COME BEFORE THE INDIANA SUPREME COURT ON A PETITION TO TRANSFER JURISDICTION FOLLOWING THE ISSUANCE OF A DECISION BY THE COURT OF APPEALS. THE PETITION WAS FILED PURSUANT TO APPELLATE RULE 57. THE COURT HAS REVIEWED THE DECISION OF THE COURT OF APPEALS. ANY RECORD ON APPEAL THAT WAS SUBMITTED HAS BEEN MADE AVAILABLE TO THE COURT FOR REVIEW, ALONG WITH ANY AND ALL BRIEFS THAT MAY HAVE BEEN FILED IN THE COURT OF APPEALS AND ALL THE MATERIALS FILED IN CONNECTION WITH THE REQUEST TO TRANSFER JURISDICTION. EACH PARTICIPATING MEMBER OF THE COURT HAS VOTED ON THE PETITION. EACH PARTICIPATING MEMBER HAD HAD THE OPPORTUNITY TO VOICE THAT JUSTICE'S VIEWS ON THE CASE IN CONFERENCE WITH THE OTHER JUSTICES. BEING DULY ADVISED, THE COURT NOW DENIES THE APPELLANT'S PETITION TO TRANSFER OF JURISDICTION.
RANDALL T. SHEPARD, CHIEF JUSTICE
ALL JUSTICES CONCUR. KJ

Respectfully submitted,

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